APPENDIX "A."

United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Union of Operating Engineers, Local Union No. 12, AFL, Respondent. No. 15,003. Oct. 9, 1956.

Petition for Enforcement of an Order of the National Labor Relations Board.

Before: Stephens, Orr, and Hastie, Circuit Judges.

ORR, CIRCUIT JUDGE:

The National Labor Relations Board, hereafter the Board, petitions this court to enforce its order against the International Union of Operating Engineers, Local No. 12, AFL, hereafter Local 12.

Local 12, together with other construction trade unions, has a collective bargaining agreement with Associated General Contractors, hereafter AGC. The legality of the agreement as such is not challenged in this case.

The agreement provided that the Union would establish and maintain an open and nondiscriminatory employment list in the work area jurisdiction of each respective Local Union of each particular trade. AGC members would first call the Union when they needed men in certain work classifications. The agreement set up a priority system for job referrals, with the highest priority for jobs going to workmen who had recently been laid off by AGC members who desired to reemploy the same workmen in the same area. Second choice went to workmen who had been employed by AGC members in the union's area jurisdiction during the previous ten years. The last group on the priority list were workmen whose names were entered on the lists in the area.

The agreement between the union and AGC also provided that all workmen covered by the agreement would become members of the union no more than thirty days after employment, as a condition of employment.[1]

Based on the agreement, Local 12 operated a job referral dispatch system to supply the requirements of AGC members for operating engineers and allied classifications. The union maintained two referral lists; the first was headed "Members" and included all members of that union who had reported that they were seeking work. The second list was called "Applicants and Others," and included nonunion workmen who had applied at the dispatch office for work within the union's jurisdiction, and also members of other locals who had transferred into the geographical jurisdiction of Local 12.

The dispatcher would first examine the "Members" list for a workman of the classification desired; if none were available, the dispatcher would then go to the "Applicants and Others" list. An individual dispatched from the second listing made an application to join Local 12, and was required to pay a work permit fee of $2.50 per week, pursuant to the International Union's constitution, which provision was not incorporated into the agreement with AGC.[2]

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[1]29 U. S. C. A. §158(a)(3) authorizes such a provision.

[2]Article XV, §3(e) of the International Union's constitution provides: "Each Local Union permitting its applicants for membership to engage at the craft, upon work under contract with, or control of, said Local Union, shall charge to and collect from each such applicant, and each such applicant shall be required to pay to it for the period involved, minimum weekly permit dues of $2 in the case of each applicant hoisting and portable engineer or apprentice, and minimum monthly permit dues of $2 in the case of each applicant stationary engineer or apprentice, and shall thereupon issue to each such applicant a temporary permit similar to the Journeyman Engineer's Temporary Permit provided in this Article."

Pursuant to alleged grievances made by Frederick R. Hummel, Robert A. Holderby, and Hoyt Covert, the General Counsel of the National Labor Relations Board issued a complaint against Local 12 alleging that the union was engaged in unfair labor practices affecting commerce within the meaning of §8(b)(1)(A) and (2) of the Labor Management Relations Act, and §2(6) and (7) of that Act.[3]

The alleged practices against Local 12 were the following: (1) operating the dispatch system to give preference to union members; (2) requiring nonunion applicants for employment to apply for union membership immediately upon referral; (3) imposing work permit fees on nonunion employees in AGC; and (4) discriminating against Robert A. Holderby in not giving him his fair share of job referrals because of his expulsion from the union.[4]

The Trial Examiner held the dual lists were in accord with the priority arrangements in the union security agreement, in that only union members would have worked for AGC contractors within the past ten years, and would qualify for the second tier of priority. The Trial Examiner found that there was no proof that the signing of an application for membership in the union was a condition precedent to the securing of a referral; and that there was no showing that the signing was not with the individual applicant's consent and for his individual convenience, in that he had to join within thirty days of his employment with an AGC contractor.

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[3]29 U. S. C. A. §158(b)(1)(A) and (2), and §152(6) and (7).

[4]The complaints by Hummel and Covert appear to have been dismissed.

With respect to Holderby, the Examiner found a correlation between his suspension from the union and lack of work referrals, but held that it was incumbent upon the General Counsel to show the availability of employment for which the claimant was qualified and a refusal by Local 12 to refer him thereto, in order to show discriminatory treatment within the meannig of the Act.[5] The Trial Examiner recommended that the charges be dismissed.

The Board refused to follow the recommendation of the Trial Examiner, and ordered the union to cease and desist from the practices complained of, and to make Holderby whole for the discrimination against him.

The Board determined that as a matter of practice union members were given job preference, citing Holderby as an example. He had been discharged from the union and his name removed from the preferred list, despite his preferential status as a former worker within the AGC unit. The Board also found that nonunion employees in fact could not exercise a free choice between applying for union membership immediately, or after the first thirty days of employment; that job applicants were aware that their only chance

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[5]The Trial Examiner's intermediate Report stated: "Holderby's uncontradicted testimony is that he was always available for employment and indeed sat around the hall for months looking for jobs. This testimony is all the more impressive when his 1954 record is examined. Thus, for no apparent reason, and two days after the issuance of the complaint therein he is suddenly referred to a job for the first time in 11 months and is thereafter kept at work with the same general degree of frequency as he had been prior to his expulsion from the Union, while his name remains on the same list, *i.e.* the "Applicants and Others" list. Then, when it becomes apparent that he will not drop the charge, but will continue the case, the supply of jobs is shut off just as abruptly as it was started. There is no evidence that jobs suddenly became more available in June, that jobs had not been available all along and the inference is unmistakable that his referrals to jobs was not based upon his location on the list without regard to other factors."

of obtaining employment with AGC employers was through Local 12's dispatching office, and thus were impliedly coerced into cooperation with the union and its membership practices. The Board also found that the permit fees charged nonunion members was a discrimination against them, since union workers were not charged such fees. It found that there was a lack of proof that the special charge levied upon the nonunion applicants was in any manner related to the cost of operating the dispatch system for their benefit.

An attempt to cause an employer to discriminate against an employee in violation of §8(a)(3) constitutes a violation of §8(b)(2) even though the employer did not as a matter of fact discriminate.[6] See N. L. R. B. v. International Longshoremen's and Warehousemen's Union *et al.*, 9 Cir., 210 F. 2d 581, 583, where it is said:

". . . Thus a literal reading of the section requires only a showing that the union caused or attempted to cause the employer to engage in conduct, which, if committed, would violate §8(a)(3)."

See also Radio Officers v. N. L. R. B., 347 U. S. 17, 53; and N. L. R. B. v. Auchter Company, 5 Cir., 209 F. 2d 273, 277.

We have reviewed the Board's findings to determine whether there is substantial evidence to support them and

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[6]29 U. S. C. A. §158(b) provides: "It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tend the periodic dues and the initiation fees uniformly required as a condition of acquiring and retaining membership."

in so doing considered not only that which supports, but also whatever in the record fairly detracts from its weight. The scope of our review includes the findings of the Trial Examiner, since it is part of the record, and deserves some weight because of his opportunity to have observed the demeanor of the witnesses.

"We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony." Universal Camera Corp. v. N. L. R. B., 340 U. S. 474, 496.

Thus viewing the entire record we find no support for the Board's findings of unfair labor practices alleged to have been committed by the labor union, with the exception of acts of discrimination against Holderby.

The record discloses as to the alleged discriminatory operation of the dispatch system that although the system devised by the union for preference in referrals could conceivably admit of a discrimination against a nonunion workman, there was no evidence of a scheme or practice of discrimination by the union.

The only instance of that kind shown was that of Holderby, and a single isolated incident of this type cannot support a cease and desist order. See N. L. R. B. v. Amalgamated Meat Cutters, 9 Cir., 202 F. 2d 671.

The Trial Examiner found adverse to the petitioner on this contention because of lack of evidence to support the claim. We think he was correct.

With respect to the alleged requirement that nonunion applicants take out union membership applications on their first referral, the Trial Examiner's holding was that there was no showing of a requirement as a "practice" by the union.[7] The convenience of an immediate application under the thirty day period is obvious, and it was necessary to establish by competent evidence that the union actually required this of nonunion workers in order to support a finding of an unfair labor *practice* within the meaning of the Act. We agree with the Trial Examiner as to lack of evidence on this point.

There is no evidence in the record with respect to the work permit fees being required of nonunion workers, except that such a provision is contained in the Constitution of the International Union of Operating Engineers. It is not established, first, that Local 12 was requiring such

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[7]The Trial Examiner's Intermediate Report stated: ". . . The fact that it was the 'practice' to have such an employee sign an application for membership at the time of his first referral is not proof that the signing of such an application for membership was a condition precedent to the securing of the referral—which, if true, would be definitely a violation of the Act. However, there is no showing in this case of any such illegal requirement. Nor is there any showing here that this signing was not with the individual employee's consent and for his individual convenience.

. . .

In the absence of proof that the making of application for membership and the payment of all or a part of the fee was a condition precedent to the referral to the job, the undersigned would be guessing and conjecturing, if he held such an indefinite 'practice' to be violative of the Act."

fees, and second, that said fees were not a reasonable charge for operating the dispatch system, and hence not a discriminatory practice against nonunion members.

There is sufficient evidence to support the Board's finding of a discrimination against Holderby. The pattern of job referrals shown in evidence, coupled with the "switch" of his name from the "Members" list to the "Applicants and Others" list, warrants a finding of a discrimination in violation of 29 U. S. C. A. §158(b)(2).[8] Holderby's applications were handled in a manner giving rise to a strong conviction that the union and Holderby were bitterly antagonistic, one to the other. The time intervals between the job referrals given Holderby are significant. After he instituted legal action against Local 12, his referrals were more frequent, evidently in an attempt at appeasement; but when Holderby refused to discontinue the legal action, the referrals again became infrequent. This circumstance is persuasive.

Under the circumstances the order of the Board is too broad. The Board is ordered to modify its order so as to require respondent Local 12 to make Holderby whole, the amount thereof to be determined in post-decree compliance proceedings. See N. L. R. B. v. Local 803, International Brotherhood of Boilermakers, etc., 3 Cir., 218 F. 2d 299. In all other respects the order of the Board is set aside.

Cause remanded to the Board with directions to modify its order in accordance with the views herein expressed, and the order so modified is ordered enforced.

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[8]See Note 5, *supra*.

HASTIE, *Circuit Judge,* dissenting in part.

This court is enforcing against the defendant labor union so much of an order of the National Labor Relations Board as gives effect to the board's conclusion "that by removing Holderby's name from the 'Member's' list because of his expulsion from the Union, thereby denying him equal access to jobs, the Respondent . . . violated Section 8(b)(2) and (1)(A) of the Act." While this language places formal reliance upon two clauses of Section 8(b), namely clauses (2) and (1)(A),[1] the opinions of the board and this court make it clear that both tribunals have analyzed the Holderby matter as essentially a violation of clause (2) without reference to the different considerations upon which an invocation of clause (1)(A) must depend.

To make my view of the matter clear, I shall consider those clauses separately. *Cf.* National Labor Relations Board v. Philadelphia Iron Works, 3d Cir. 1954, 211 F. 2d 937, 943-44.

I think the union's action with reference to Holderby did not constitute a violation of clause (2) of Section 8(b). The issue under that clause is whether the union caused or attempted to cause any employer to discriminate against Holderby in violation of the Act. In resolving that issue it must be determined whether the union caused

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[1]Section 8(b) of the National Labor Relations Act, as amended, 61 Stat. 140, as amended, 65 Stat. 601, 29 U. S. C. §158(b)(1)(A) and (2), reads in pertinent part as follows:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of their rights guaranteed in section 157 of this title. . . .

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section. . . ."

or attempted to cause an "employer to engage in conduct which, if committed would violate Section 8(a)(3)."[2] Radio Officers' Union v. National Labor Relations Board, 1954, 347 U. S. 17, 53.

In this case no employer was told or even given reason to believe that Holderby or anyone else was being treated improperly in the matter of job referral. No one brought to any employer's attention any charge that the union was abusing the lawful referral arrangement to which various employers had subscribed. At most the union was accomplishing an effective discrimination against Holderby without causing or attempting to cause any employer to act improperly in any way.

In this all important respect the present case differs from the numerous adjudicated cases in which the board and the courts have found violations of Section 8(b)(2). Those cases characteristically reveal either aggressive wrongdoing by the employer himself or his acquiescence and cooperation in making misconduct on the part of the injurious to some employee.[3]

National Labor Relations Board v. International Longshoremen's and Warehousemen's Union, 9th Cir. 1954, 210 F. 2d 581, deserves special mention because it is a very recent decision of this court. But there to the employer was chargeable with knowledge of and respon-

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[2]That subsection makes it an unfair labor practice for an employer "(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . ." 29 U. S. C. §158(a)(3).

[3]See *e.g. National Labor Relations Board v. Local 803, International Brotherhood of Boilermakers*, AFL, 3d Cir. 1955, 218 F. 2d 299 (On union demand the employer fired and refused to hire men not in good standing in the union); *National Labor Relations*

sibility for the misconduct of certain wrongdoing dispatchers, because those dispatchers were employees of the employer as well as the union and were subject to removal by an employer-union committee.

In the present case the board has made a passing, but in my view unsuccessful, effort to charge employer complicity in or responsibility for the union's alleged wrongdoing. In a footnote the board refers to the employer's duty "to insist that the union fulfill its contractual obligation of maintaining nondiscriminatory hiring lists." I think it would be unfair and irrational to impose such a duty unless and until the employer is at least put on notice that the union is improperly discriminating against someone in the making of referrals. And, I know of nothing in the Act or its history that suggests legislative intention to burden the employer with ferreting out union misconduct on penalty of being charged with complicity in that which he has not discovered.

The foregoing analysis leads me to agree with the member of the board who dissented in this case that the record does not establish a violation of Section 8(b)(2).

The problem presented under Section 8(b)(1)(A) is different. That clause makes it an unfair labor practice for a union to restrain or coerce employees in the exer-

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Board v. International Union of Operating Engineers, Local 101, AFL, 8th Cir. 1954, 216 F. 2d 161 (Employees discharged in accordance with union seniority rules though employer's rules provided otherwise); *National Labor Relations Board v. Philadelphia Iron Works,* 3d Cir. 1954, 211 F. 2d 937 (Union caused employer to withdraw job offer); *National Labor Relations Board v. George Auchter Co.,* 5th Cir. 1954, 209 F. 2d 273 (Employer refused to employ applicant because of union's refusal to issue referral); *National Labor Relations Board v. Bell Aircraft Corp.,* 2d Cir. 1953, 206 F. 2d 235 (Employee denied promotion because union charges pending against him).

cise of freedom of choice in matters of organization, bargaining and concerted activities. The opinion of the board does not address itself to this aspect of the union's dealings with Holderby. We are not told upon what facts the Board relies or how it has arrived at the conclusion that a violation of this clause is established on the present record. This deficiency is a matter of concern because the record does not make it clear why Holderby was dropped from the union or why his subsequent request for reinstatement was denied. It does appear that his controversy with the union has reached the stage of litigation in the state courts. It is not clear whether a violation of clause (1)(A) should have been, or would have been, found had the board directed its attention with particularity to that clause rather than clause (2).

In these circumstances, I would send the case back to the board for the specific purpose of reconsidering the Holderby matter solely as a possible violation of clause (1)(A). I would withhold judicial review of this issue until the considered judgment of the board is revealed by findings and conclusions which place the matter and the Board's view of it clear in focus. In all other particulars I would deny the petition for enforcement.

(Endorsed): Opinion and Dissenting Opinion. Filed, Oct. 9, 1956. Paul P. O'Brien, Clerk.

APPENDIX "B."

In the United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Petitioner, v. International Union of Operating Engineers, Local No. 12, AFL, Respondent. No. 15003.

Decree Enforcing, as Modified, an Order of the National Labor Relations Board.

Before: Stephens, Orr, and Hastie, *Circuit Judges.*

This cause came on to be heard upon the petition of the National Labor Relations Board to enforce its order dated August 15, 1955. The Court heard argument of respective counsel on July 10, 1956, and has considered the briefs and the transcript of record filed in this cause. On October 9, 1956, the Court, being fully advised in the premises, handed down its decision enforcing, as modified, the Board's Order. In conformity therewith, it is hereby.

ORDERED, ADJUDGED AND DECREED that the Respondent, International Union of Operating Engineers, Local No. 12, AFL, its officers, agents, successors, or assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees or prospective employees of employer-members of Associated General Contractors, Southern California Chapter, in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act, as amended, hereinafter called the Act, except to the extent that such rights may be affected by an agreement requiring membership in Local 12 as a condition of employment as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action, which the National Labor Relations Board has found will effectuate the policies of the Act:

(a) Make whole Robert A. Holderby for any loss of pay he may have suffered as a result of the discrimination against him, in the manner set forth in Section V, of the National Labor Relations Board's Decision and Order, dated August 15, 1955, entitled "The Remedy."

(b) Post in conspicuous places at the job, dispatching offices of the respondent, and in all places where notices or communications to its members or applicants for employment are customarily posted, copies of the notice attached hereto and marked "Appendix." Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region of the National Labor Relations Board, Los Angeles, California, shall, after being duly signed by the respondent's representative, be posted by the respondent immediately upon receipt thereof and maintained by it for a period of sixty (60) consecutive days thereafter. Reasonable steps shall be taken by respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Mail to the aforesaid Regional Director signed copies of the notice attached hereto as "Appendix," for posting, the employers willing, at the job sites of employers who, through membership in the Associated General Contractors, Southern California Chapter, obtain employees through respondent's dispatch system. Such notices are to be posted and maintained for a period of sixty (60) consecutive days after receipt by the employers. Copies of the notices, to be furnished by the said Regional Director, shall, after being duly signed by an official representa-

tive of the respondent, be forthwith returned to the said Regional Director for posting.

(d) Notify the said Regional Director, in writing, within ten (10) days from the date of this Decree, what steps the respondent has taken to comply herewith.

[Endorsed—Decree filed and Entered Dec. 10, 1956.]

/s/ PAUL P. O'BRIEN
Paul P. O'Brien
Clerk

A True Copy—Dec. 11, 1956.
/s/ PAUL P. O'BRIEN
Attest: Paul P. O'Brien
Clerk

APPENDIX.

Notice to All Members of International Union of Operating Engineers, Local No. 12, AFL

and

To All Employees and Prospective Employees of Employer-Members of Associated General Contractors, Southern California Chapter

Pursuant to

A Decree Enforcing as Modified an Order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify you that

WE WILL NOT restrain or coerce employees or prospective employees of employer-members of ASSOCIATED GENERAL CONTRACTORS, SOUTHERN CALIFORNIA CHAPTER, in the exercise of the rights guaranteed by Section 7 of the Act, except to the extent that

such rights may be affected by an agreement requiring membership in Local 12 as a condition of employment as authorized by Section 8(a)(3) of the Act.

WE WILL make ROBERT A. HOLDERBY whole for any loss of pay he may have suffered as a result of the discrimination against him.

INTERNATIONAL UNION OF OPERATING ENGINEERS
LOCAL No. 12, AFL
(Labor Organization)

Dated..... By.....
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX "C."

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES.

* * * * * * * *

Sec. 8(b). It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee

with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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Sec. 10(e). The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board.

No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	2
Statement	2
A. The Board's findings and conclusions	2
B. The Board's order	7
C. The decision of the court below	7
Argument	8
Conclusion	9

CITATIONS

Cases:	
National Labor Relations Board v. *Alaska Steamship Company*, 211 F. 2d 357	9
National Labor Relations Board v. *George D. Auchter Company*, 209 F. 2d 273	9
National Labor Relations Board v. *International Longshoremen's and Warehousemen's Union*, 210 F. 2d 581	9
National Labor Relations Board v. *Local 803, International Brotherhood of Boilermakers*, 218 F. 2d 299	9
National Labor Relations Board v. *Swinerton et. al.* 202 F. 2d 511, certiorari denied, 346 U. S. 814	9
Radio Officers v. *National Labor Relations Board*, 347 U. S. 17	8
Statute:	
National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*):	
Section 7	7
Section 8 (a) (3)	8
Section 8 (b) (1) (A)	5, 7
Section 8 (b) (2)	2, 5, 7, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 760

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL NO. 12, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (Pet. App. 1–12) are reported at 237 F. 2d 670. The findings of fact, conclusions of law and order of the Board (R. 25–49) are reported at 113 NLRB 655.

JURISDICTION

The decree of the court below (Pet. App. 13–16) was entered December 10, 1956. The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether, on the facts, the Board properly found that petitioner union violated the rights of an em-

ployee, protected by Section 8 (b) (2) of the National Labor Relations Act, as amended, by denying him equal access to jobs.

STATUTE INVOLVED

The pertinent portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), are set forth in the petition (Pet. App. 17–19).

STATEMENT

A. THE BOARD'S FINDINGS AND CONCLUSIONS

Local 12, together with other construction trade unions, has a collective bargaining agreement with Associated General Contractors, herein called AGC (R. 29, 51). Under this agreement, Local 12 is authorized to dispatch certain classifications of workmen for employment with the building and construction contractors who comprise the membership of AGC (R. 30–31, 56, 151–153).

At all times relevant, the collective bargaining agreement between Local 12 and its sister unions on the one hand and AGC on the other contained an exclusive recognition clause, a recital of the employers' freedom to hire and discharge employees subject to the conditions imposed by the agreement, and a union-security clause requiring employees of AGC members covered by the agreement to become members of the appropriate local union not more than thirty days after being employed (R. 29–30, 150–151). The agreement made further provision for a hiring dispatch system in the following terms (R. 30–31, 151–152):

B. That in the employment of workmen for all work covered by this Agreement in the territory above-described, the following provisions, subject to the conditions of Article II–A, above shall govern:

1. That the Local Unions shall establish and maintain open and nondiscriminatory employment lists for employment of workmen in the work and area jurisdiction of each respective Local Union of each particular trade.

That the Contractors shall first call upon the respective Local Unions having work and area jurisdiction, or their Agents, for such men as they may from time to time need, and the respective Local Unions, or their Agents, shall immediately furnish to the Contractors the required number of qualified and competent workmen and skilled mechanics of the classifications needed by the Contractors.

That the respective Local Unions, or their Agents, will furnish each such required competent workman or skilled mechanic entered on their lists, to the Contractors by use of a written referral and will furnish such workmen or skilled mechanics from the respective Local Unions' listing in the following manner:

(a) Workmen who have recently been laid off or terminated in that respective Local Union's work and area jurisdiction by the Contractors desiring to reemploy the same workmen in the same area provided they are available for employment.

(b) Workmen who have been employed by Contractors in the respective Local Union's work and area jurisdiction within the multiple-employer unit during the previous ten (10) years, and are available for employment.

418148—87——2

(c) Workmen whose names are entered on the list of the respective Local Union having work and area jurisdiction and who are available for employment.

Pursuant to the collective bargaining agreement, AGC members called Local 12 whenever they required operating engineers or other classifications of employees falling under the jurisdiction of that Local (R. 32, 59–60). As stated above, the agreement gave first priority in job referrals to workmen who had recently been laid off or terminated and whom the employer wanted to rehire. Apart from these instances, the agreement gave preference to workmen who had been employed by AGC members during the previous ten years as against other applicants for employment.

The practice of Local 12 under this agreement, however, was to maintain two separate categories of workmen who were out of work and available for dispatch. The first category, headed "Members," included all members of Local 12 who were seeking work, whether or not they had worked for AGC members during the previous ten years; the second category, denominated "Applicants and Others," included members of sister locals of Local 12 who had transferred into the geographical area covered by Local 12 as well as nonunion members who applied to Local 12 for dispatch (R. 32, 68–69, 72–73). When an employer called in for workmen, Local 12 would first check the "Members" list for workmen having the required skills and the individual longest out of

work would be dispatched (R. 33, 72–73).[1] Only if that list contained no qualified workmen would Local 12 resort to the "Applicants and Others" list (R. 33, 69, 72).[2]

Robert A. Holderby became a member of Local 12 in November 1952 (R. 78). In January 1953, he was suspended for dues delinquency. Pursuant to Holderby's request for reinstatement, Local 12 wrote him, under date of March 17, 1953, that he would be reinstated upon payment of certain dues and fees which had accrued. Three months later, however, in June 1953, Local 12 wrote Holderby again, revoking his reinstatement and returning to him all initiation fees, dues and permit fees which he had theretofore paid (R. 15–17, 34).

Prior to the June 1953 action of Local 12 rejecting Holderby's request for reinstatement, Holderby's name had appeared on the "Members" list and he had regularly been referred for employment by Local 12 (R. 38, 92, 157–160). Thereafter, however, his name

[1] An employer's request for the return of a specific workman would be honored regardless of his position on the "Members" list (R. 35). McNeel, the Local 12 representative, could not recall any instance, however, where a specific man on the "Applicants and Others" list was requested or dispatched as against qualified workmen on the "Members" list (*ibid.*).

[2] On these and other facts, the Board concluded that Local 12 discriminatorily operated its dispatch system in violation of Section 8 (b) (1) (A) and (2) of the Act. The court below set aside this finding, stating that although the Union's referral system "could conceivably admit of a discrimination against a nonunion workman, there was no evidence of a scheme or practice of discrimination by the union" (Pet. App. 6). No question is presented here as to the validity of either the terms or the operation of the agreement generally.

was removed from the preferred "Members" list and placed at the top of the "Applicants and Others" list (R. 38, 89–90, 68). From that time on and for approximately twelve months, Holderby, despite frequent visits to the Local 12 office, was never dispatched to a job, although on one or two occasions the Local 12 dispatcher attempted to notify him of a possible referral (R. 34, 93–95). For about four months during this period, Holderby was employed as a truck salesman working on commission (R. 34–35, 103–104). Even during these months, however, Holderby was available for work as an operating engineer and throughout the entire period he sought, without success, to obtain construction work by applying to Local 12 for referrals and by applying personally to contractors (R. 35, 109–112).

On June 3, 1954, two days after the issuance of the complaint herein, Local 12 offered Holderby two jobs and continued to dispatch him fairly regularly until shortly before the hearing, when again the referrals ceased (R. 34, 97, 161).

The Board, one member dissenting, rejected petitioner's contention that, since there was no proof in the record that jobs were available to which Holderby would have been referred but for the removal of his name from the "Members" list, no violation of the Act had been established. The Board concluded that "the mere removal of Holderby's name from the contractual preferred list because he had lost his Union membership was a violation of the Act, and that the extent to which Holderby actually suffered loss of employment is a matter for determination at the compliance stage of the proceeding. * * * It is

clear that, for purposes of job referral, Local 12 refused to consider Holderby on an equal basis with individuals who were entitled to preference under the AGC agreement, simply because he was no longer a member of Local 12. 'This denial of equal access to the available jobs was in itself and without more a restrictive imposition in violation of the Act'" (R. 38–39).

Accordingly, the Board found that by removing Holderby's name from the "Members" list because of his expulsion from the union, thereby denying him equal access to jobs, petitioner violated Section 8 (b) (2) and (1) (A) of the Act.

B. THE BOARD'S ORDER

The Board's order, insofar as here material, required Local 12 to cease and desist from restraining or coercing employees or prospective employees of AGC members in the exercise of their rights under Section 7 of the Act; to make Holderby whole for any loss of earnings suffered as a result of the discrimination against him; and to post appropriate compliance notices (R. 43–44).

C. THE DECISION OF THE COURT BELOW

Enforcing the Board's order respecting Holderby, the court below (Orr and Stephens, JJ., with Hastie, J., dissenting in part) held (Pet. App. 8), "The pattern of job referrals shown in evidence, coupled with the 'switch' of his name from the 'Members' list to the 'Applicants and Others' list, warrants a finding of a discrimination in violation of 29 U. S. C. A. § 158 (b) (2)."

ARGUMENT

The ruling of the court below, sustaining the Board's holding that petitioner's discriminatory refusal to clear Holderby for employment was a violation of Section 8 (b) (2) of the Act, is correct, and there are no contrary decisions. This Court observed in *Radio Officers* v. *National Labor Relations Board*, 347 U. S. 17, 53, that "a literal reading of [Section 8 (b) (2)] requires only a showing that the union caused or attempted to cause the employer to engage in conduct which, if committed, would violate § 8 (a) (3)." An attempt to cause an employer to discriminate against an employee in violation of Section 8 (a) (3) would obviously constitute a violation of Section 8 (b) (2) even if the employer resisted and refused to discriminate. By the same token, a union is not exonerated where it has so successfully masked its true purpose that the employer fulfills the union's discriminatory objective without knowledge that he has done so. Here, absent referral by petitioner, Holderby was precluded from access to AGC jobs. Petitioner imposed discriminatory requirements upon such access. In the circumstances, the necessary consequence was that by its action petitioner brought about a discriminatory denial of employment to Holderby just as effectively as if it had advised a particular employer to deny him employment.[2] In either

[2] The fact that a charge of unlawful discrimination might not lie against the employer in the circumstances of this case is not significant. The Board may, under Section 8 (b) (2), proceed against the union "without joining the employer, and * * * absent a finding of violation of Section 8 (a) (3) * * *." *Radio Officers*, *supra*, at p. 53.

case, the violation of Section 8 (b) (2) is complete when the union commits the last act necessary to achieve its discriminatory purpose. Cf. *National Labor Relations Board* v. *George D. Auchter Co.*, 209 F. 2d 273, 277 (C. A. 5); *National Labor Relations Board* v. *International Longshoremen's and warehousemen's Union*, 210 F. 2d 581, 584 (C. A. 9); *National Labor Relations Board* v. *Local 803, International Brotherhood of Boilermakers*, 218 F. 2d 299, 302 (C. A. 3); *National Labor Relations Board* v. *Alaska Steamship Company*, 211 F. 2d 357, 360 (C. A. 9); *National Labor Relations Board* v. *Swinerton et al.*, 202 F. 2d 511, 515 (C. A. 9), certiorari denied, 346 U. S. 814.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any substantial question calling for review. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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